

TO: All Parties to Fiber Technologies Networks, L.L.C., D.T.E. 01-70
FROM: Robert J. Howley, Hearing Officer
DATE: October 26, 2001
RE: Ruling on Procedural Schedule and Petition to Intervene
CC: Mary Cottrell, Secretary
Commission

HEARING OFFICER'S RULING ON PROCEDURAL SCHEDULE
AND PETITION TO INTERVENE

I. INTRODUCTION

On August 27, 2001, Fiber Technologies Networks, L.L.C. ("Fibertech") filed a complaint with the Department of Telecommunications and Energy ("Department") regarding access to poles owned or controlled by Shrewsbury's Electric Light Plant ("SELP") pursuant to G.L. c. 166, § 25A ("Pole Attachment Statute") and 220 C.M.R. §§ 45 et seq. ("Pole Attachment Regulations"). This matter was docketed as D.T.E. 01-70. SELP filed a response to Fibertech's complaint on September 17, 2001.

On October 16, 2001, the Department proposed a procedural schedule for this proceeding. On that same date, pursuant to the Department's Notice in this proceeding, Metromedia Fiber Network Services, Inc. ("MFN") filed a timely petition seeking to intervene as a full party ("MFN Petition"). On October 18, 2001, Fibertech filed a Motion to change the order of presentation under the proposed procedural schedule ("Fibertech Motion").

A public hearing and procedural conference were held at the Department's offices on October 18, 2001. Fibertech filed written comments on the Department's proposed procedural schedule ("Fibertech Comments"). SELP also filed written comments on the Department's proposed procedural schedule ("SELP Comments") and an opposition to MFN's Petition ("SELP Opposition"). MFN filed a response to the SELP Opposition ("MFN Response") on October 23, 2001.

II. PROCEDURAL SCHEDULE

A. Positions of the Parties

1. Fibertech

Fibertech states that SELP has the burden to go forward with evidence to justify the denial of access to Fibertech. In support, Fibertech cites the Federal Communications Commission's ("FCC") Local Competition Order¹ for the FCC's position that utilities have the ultimate burden of proof in denial of pole attachment access cases (Fibertech Motion at 2). Fibertech states that because SELP has the burden of proof in this matter, SELP should proceed first in submitting its case (id.). Fibertech states that SELP should submit its pre-filed testimony on November 2, 2001 with Fibertech filing its pre-filed testimony on November 9, 2001 (Tr. 1, at 7). In the alternative, Fibertech seeks an additional week to file its pre-filed testimony so that its pre-filed testimony would be due November 9, 2001 with SELP's pre-filed testimony due November 16, 2001 (id.).²

Fibertech contends that evidentiary hearings are necessary for adjudication of this dispute. Specifically, Fibertech states that hearings are necessary in order to present evidence regarding Fibertech's business plan, the nature of SELP's actions in denying Fibertech's access requests and the role of SELP in the telecommunications market in the Town of Shrewsbury (Fibertech Comments at 2).

2. SELP

SELP states that the Department's regulations at 220 C.M.R. § 1.06(6)(f) provide that the complainant "opens and closes any case" (SELP Comments at 6). Therefore, SELP requests that the Department deny Fibertech's Motion to change the order of presentation in this proceeding.

With respect to Fibertech's request for evidentiary hearings, SELP contends that based on the nature of the complaint (i.e., whether Fibertech is a "licensee" and whether dark fiber is an "attachment" under the Pole Attachment Statute and Regulations), the Department can adjudicate this complaint solely on the pleadings (id. at 1-2). SELP states that the Department envisioned that complaints under the Pole Attachment Regulations could be adjudicated without the need for hearings since 220 C.M.R. § 45.06 allows parties to waive their rights to formal

¹ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection, First Response and Order, CC Docket Nos. 96-98, 95-185 (August 1996).

² MFN supports Fibertech's request for an additional week to file pre-file testimony (Tr. 1, at 8).

hearings (id. at 2). SELP contends that because any questions in this proceeding can be resolved through an informal technical conference and joint stipulation of facts, no hearings are necessary (id. at 7).

3. Analysis and Findings

The order of presentation under the Department's regulations require that the complainant open and close a proceeding. 220 C.M.R. § 1.06 (6)(f). Further, under the Pole Attachment Regulations, a complainant must present sufficient information and evidence to support all the factual allegations in its complaint (e.g., a copy of the written request for access; the reasons given for the denial of access and the basis for the claim that the denial is improper). 220 C.M.R. § 45.04. Therefore, under the Pole Attachment Regulations, the complainant has the initial burden to present evidence supporting a claim of discriminatory access. Id. Accordingly, Fibertech, as the complainant, will file its pre-filed testimony first and will testify first at any hearing.

With respect to the issue of evidentiary hearings, pursuant to the Pole Attachment Regulations, a party may request a formal hearing or waive a formal hearing. 220 C.M.R. § 45.04(2)(i). Here, Fibertech has requested a hearing (Fibertech Petition at 12). Although SELP argues that this proceeding can be adjudicated without evidentiary hearings, I find that an evidentiary hearing may assist the Department in resolving this complaint. Fibertech's request for a formal hearing is, therefore, granted. However, any party is free to assert that this matter presents only a question of law and may move for summary judgment, as appropriate. 220 C.M.R. § 1.06(6)(e).

After considering the parties' proposed procedural schedules, I have determined that the following schedule will allow the Department to conduct this proceeding in the most efficient and thorough manner:

Pre-Filed Testimony of Fibertech	November 9, 2001
Pre-Filed Testimony of Shrewsbury Electric Light Plant	November 16, 2001
Last Day to Issue Discovery	November 23, 2001
Final Discovery Responses Due	November 30, 2001
Evidentiary Hearings	December 4, 2001 December 6, 2001
Simultaneous Initial Briefs	December 21, 2001
Simultaneous Reply Briefs	January 11, 2002

III. PETITION TO INTERVENE

A. Positions of the Parties

1. MFN

MFN, a provider of leasing fiber optic cable to customers, states that it may be specifically and substantially affected by the Department's finding and rulings in this proceeding because it deploys fiber optic cable in Massachusetts (MFN Petition at 3). MFN states that it is exposed to the possibility that a utility could revoke its pole attachment rights in the event the Department finds that dark fiber is not entitled to attach to utility poles (MFN Response at 4). MFN contends that the only issue it intends to address in this proceeding involves whether a provider of dark fiber is entitled to be treated as a "licensee" under the Pole Attachment Statute and Regulations (*id.* at 6). MFN concludes that since it is not raising any additional issues beyond those mentioned in the complaint and response, neither party will be prejudiced if the Department grants the MFN Petition (*id.* at 7-8).

2. SELP

SELP states that because MFN has already obtained attachment agreements and grants of location in various municipalities and because MFN's only concern is that the Department's ruling might impact its pursuit of future grants of location in public ways, MFN fails to state how the Department's order would specifically have an adverse impact on its business operations (SELP Opposition at 4). SELP states that the Department has no role in the enforcement or implementation of grants of location under G.L. c. 166 § 22 (*id.*). SELP also states that MFN's interests appear to be the same as Fibertech; that is, the answer to the question of whether dark fiber is an "attachment" within the meaning of the Pole Attachment Statute (*id.* at 5). SELP contends that allowing MFN to introduce broad public policy issues in a complaint under the Pole Attachment Statute would be inappropriate and prejudicial (*id.* at 6). SELP argues that MFN has failed to demonstrate that it is substantially and specifically affected by these proceedings and requests that the Department deny the MFN Petition (*id.* at 7).

IV. STANDARD OF REVIEW

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. §1.03(1)(b); *see also* G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. *Attorney General v. Department of Public Utilities*, 390 Mass. 208, 216 (1983); *Boston Edison Company v. Department of Public Utilities*, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), *cert. denied*, 439 U.S. 921 (1978); *see also Robinson v. Department of Public Utilities*, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to

participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. Boston Edison, 375 Mass. at 45. The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. Id.

In addition, when ruling on a petition to intervene or participate, a Hearing Officer may consider, among other factors, the interests of the petitioner, whether the petitioner's interests are unique and cannot be raised by any other petitioner, the scope of the proceeding, the potential effect of the petitioner's intervention on the proceeding, and the nature of the petitioner's evidence, including whether such evidence will help to elucidate the issues of the proceeding, and may limit intervention and participation accordingly. See, e.g., Hearing Officer's Ruling on Petitions to Intervene, D.P.U. 92-111 (1992); Hearing Officer's Ruling, D.P.U. 90-284 at 3 (April 24, 1991); Interlocutory Order on Appeal of Hearing Officer Ruling, D.P.U. 88-250 at 5, 6 (March 21, 1989). The Department exercises the discretion afforded it under G.L. c. 30A, § 10 so that it may conduct a proceeding with the goal of issuing a reasoned, fair, impartial and timely decision that achieves its statutory mandate. Procedural Order, Berkshire Power Development, Inc., D.P.U. 96-104 (January 9, 1997).

V. ANALYSIS AND FINDINGS

The present complaint is before the Department because SELP has denied Fibertech access to its poles. The parties dispute whether Fibertech is a “licensee” and whether the “attachments” proposed by Fibertech are within the terms of 220 C.M.R. § 45.00 et seq. and G.L. c. 166, § 25A. In order to find that Fibertech is entitled to nondiscriminatory access to SELP’s poles, the Department must determine whether Fibertech qualifies as a licensee as defined in G.L. c. 166, § 25A and 220 C.M.R. § 45.02 and whether the technology at issue is an attachment that falls within the protections of 220 C.M.R. § 45.00, et seq. and the statutory definition contained in G.L. c. 166, § 25A.

To be permitted to intervene, MFN must show that it is substantially and specifically affected by the proceeding. MFN does not allege that it has ever requested and was denied access to SELP’s poles. In fact, MFN admits that it has no actual dispute with SELP (MFN Petition at 2). Because this complaint involves a specific adjudication of the rights of Fibertech with respect to SELP, I find that MFN has not shown that it is substantially and specifically affected by the proceeding.

Although the specific dispute does not involve MFN, it does raise a particular question of law; specifically, whether dark fiber is entitled to the protections under the Pole Attachment Regulations. As both MFN and Fibertech are providers of dark fiber, MFN’s interests are not unique and can be raised by Fibertech in this regard. However, because policy matters of potential precedential value are under review in this proceeding, I will grant MFN limited participant status. As a limited participant, MFN will be placed on the service list and is entitled to receive copies of all pleadings. MFN is also permitted to file briefs and reply briefs.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this ruling to the Commission by filing a written appeal with supporting documentation by October 31, 2001. A copy of this ruling must accompany any appeal. A response to any appeal must be filed by November 5, 2001.

Robert J. Howley, Hearing Officer